83-324

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

MICHAEL CONSTRUCTION COMPANY
Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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I

QUESTION PRESENTED

Whether a district court may decline to enforce an agency subpoena which is found to be frivolous, unreasonable and at least partly grounded in improper purpose; or whether, on the other hand, enforcement may be denied only upon a finding of pure and positive bad faith.

MICHAEL CONSTRUCTION COMPANY is a subsidiary of Michael Investment Corporation, a Tennessee corporation. It is an affiliate of Biloxi Prestress Concrete, Inc., a Mississippi corporation.

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OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, A-1—A-16) is reported at 706 F.2d 244. The opinion of the district court, not published, is contained in its findings of fact and conclusions of law (App. B, *infra*, A-17—A-35); in its order of April 16, 1982 (App. C, *infra*, A-36); in its order of July 19, 1982 (App. D, *infra*, A-37—A-39); and in its order of October 13, 1982 (App. E, *infra*, A-40).

JURISDICTION

The judgment of the court of appeals was entered on May 4, 1983 (App. A, *infra*, A-1—A-16). A petition for rehearing and rehearing en banc was denied by order entered June 1, 1983 (App. F, *infra*, A-49). The jurisdiction of the Supreme Court is afforded by 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

A portion of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-8(a), provides:

> (a) Access to evidence. In connection with any investigation of a charge filed under section 706 [42 USCS §2000e-5], the Commission or its designated representative shall at all reasonable times have access to, for the purposes of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to unlawful employment practices covered by this title [42 USC §§2000e et seq.] and is relevant to the charge under investigation.

Subpoena power is granted to the Equal Employment Opportunity Commission by 42 U.S.C. § 2000e-9, which provides:

> For the purpose of all hearings and investigations conducted by the Commission or its duly authorized agents or agencies, section 11 of the National labor Relations Act (49 Stat. 455; 29 USC 161) shall apply.

29 U.S.C. § 161(2) provides:

> In case of contumacy or refusal to obey a subpoena issued to any person, any district court of the United States or the United States courts to any Territory or possession, within the jurisdiction of which the inquiry is carried on or within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides or transacts business, upon application by the Board shall have jurisdiction to issue to such person an order requiring such person to appear before the Board, its member, agent, or agency, there to produce evidence if so ordered, or there to give testimony touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof.

The Administrative Procedure Act contains the following provision found at 5 U.S.C. § 555(d), pertinent to the question presented:

> On contest, the court shall sustain the subpoena or similar process or demand to the extent that it is found to be in accordance with law.

As to Internal Revenue matters, 26 U.S.C. § 7402(b) provides:

> (b) If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, or other data, the district court of the United States for the district in which such person resides or may be found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, or other data.

Federal Trade Commission subpoenas may be enforced under a portion of 15 U.S.C. § 49:

> Such attendance of witnesses and the production of such documentary evidence, may be required from any place in the United States, at any designated place of hearing. And in case of disobedience to a subpoena the commission may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence.
>
> Any of the district courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any person, partnership, or corporation, issue an order requiring such person, partnership, or corporation to appear before the commission, or to produce documentary evidence if so ordered, or to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof.

The Department of Energy is by 42 U.S.C. § 7255 granted the same subpoena powers as the Federal Trade Commission.

The Securities and Exchange Commission subpoena power is provided by 15 U.S.C. § 78u(c):

> (c) In case of contumacy by, or refusal to obey a subpena [sic] issued to, any person, the Commission may invoke the aid of any court of the United States within the jurisdiction ... in requiring the attendance and testimony of witnesses and the production of books, papers, correspondence, memoranda and other records. And such court may issue an order requiring such person to appear before the Commission ... to produce records, if so ordered, or to give testimony touching the matter under investigation or in question ....

STATEMENT OF THE CASE

Federal agencies having powers of investigation are typically required to make application to the federal district courts to secure enforcement of their subpoenas. The question as to the scope of the district court's inquiry and discretion in such proceedings has arisen and continues to arise in scores of cases. The leading case, *United States* v. *Powell*, 379 U.S. 48, 85 S.Ct. 248, 13 L.Ed.2d 112 (1964), is interpreted quite differently among the circuits. One view, to the effect that the district court may not go further than to inquire whether the subpoena was issued in bad faith, was adopted by the Eighth Circuit in this case. The opposing and broader view of the district court's purview of discretion is exemplified by the majority opinion in *S.E.C.* v. *Wheeling-Pittsburgh Steel Corp.*, 648 F.2d 118 (3rd Cir. 1981) (en banc), holding that the court's process may be abused although administrative bad faith is not found. Additional cases illustrating this dichotomy are cited in the argument, *infra*, pp. 6-10.

In the case presented, the employer refused to comply with the administrative subpoena, contending, *inter alia*, that the EEOC issued the subpoena for the sole purpose of coercing a monetary payment in a case the agency knew to be groundless. The agency applied to the district court for enforcement under 29 U.S.C. § 161(2), and the employer filed answer challenging the subpoena. Finding reason for further inquiry upon the issues raised by the pleadings and preliminary statements, the district court took evidence and found that the subpoena enforcement action was groundless, frivolous, unreasonable, and without foundation, although not brought in subjective bad faith (App. B, *infra*, A-33; App. D, A-37—A-38; App. E, A-40). The district judge also found that the issuance of the subpoena was motivated at least in part by the agency's intent to coerce a monetary settlement for the complaining party even though the agency file reflected that the claim had no merit (App. B, *infra*, A-29-30). Describing the case as one which demonstrated "bureaucratic arrogance," the trial court declined to lend its power to the enforcement of the agency subpoena, and awarded attorneys' fees to the employer as the prevailing party under 42 U.S.C. § 2000e(5) (k) (App. B, *infra*, A-30-33).

The Eighth Circuit reversed the judgment of the trial court and remanded the cause for enforcement of the subpoena. The panel stated that finding that the EEOC investigation and subpoena enforcement action were "frivolous, unreasonable and without foundation" was not equivalent to a finding of bad faith (App. A, *infra*, A-14); further, the appeals court stated that the trial court's oral finding that the subpoena was "at least partially intended" to coerce an unwarranted payment was not ground for denial of enforcement (App. A, *infra*, A-12, 14).

ARGUMENT

Under the holding of the court of appeals, the district court, acting as a court of equity, must now order compliance with a subpoena which it has in strong terms denounced as mindless and tainted. This anomaly results from the Eighth Circuit's adoption of the extremely narrow view that only a showing of unadulterated bad faith on the part of the agency is ground for declining to enforce: a holding that is not required or suggested by *Powell, supra,* or by *United States* v. *LaSalle National Bank,* 437 U.S. 298, 98 S.Ct. 2357, 57 L.Ed.2d 221 (1978); *United States* v. *Bisceglia,* 420 U.S. 141, 95 S.Ct. 915, 43 L.Ed.2d 88 (1975); or *Donaldson* v. *United States,* 400 U.S. 517, 91 S.Ct. 534, 27 L.Ed.2d 580 (1971). Rather, the holding is contrary to guidance offered by *Bisceglia,* where this Court said:

> So here, Congress has provided protection from *arbitrary or capricious* action by placing the federal courts between the Government and the person summoned.
>
> *United States* v. *Bisceglia,* 420 U.S. at 151, 95 S.Ct. at 921, 43 L.Ed.2d 88 (1975) (emphasis added).

Likewise, in *Oklahoma Press Pub. Co.* v. *Walling,* 327 U.S. 186, 66 S.Ct. 494, 90 L.Ed. 614 (1946), the Court stated that the agency "shall not act *arbitrarily* ..." and noted that judicial supervision protects against unreasonableness. 327 U.S. at 216, 66 S.Ct. at 509, 90 L.Ed. 614 (emphasis added).

Previously, the Eighth Circuit had itself embraced the view that enforcement could be denied if the action was arbitrary or unfounded. In *Walling* v. *Benson,* 137 F.2d 501 (8th Cir. 1943), cert denied, 320 U.S. 791, 64 S.Ct. 206, 88 L.Ed. 476 (1943), not cited in the opinion below, the court had said:

> [W]e believe that the district court is entitled to the assurance that it is not giving judicial sanction and force to unwarranted or arbitrary action, but that reasonable ground exists for making the investigation. Judicial enforcement necessarily is the exercise of judicial power, and

judicial function can never wholly escape the test of judicial responsibility.

• • •

[T]he issuance of the enforcement order still implies a judicial sanction and confirmation of the purpose and scope of the Administrator's investigatory action ...."

137 F.2d at 504-505.

The adoption by the Eighth Circuit of the "bad faith only" test strips away from the trial court the power to exercise the discretion that Congress intended to vest and that has always been thought to be reposed in a court of equity. It renders practically meaningless the function of the district court, and embarrasses it with the duty to do what all reason says a court should not do: lend its aid to an arbitrary and unreasonable foray which has, as at least one of its purposes, the wrongful extraction of money from a citizen.

Such a result would be avoided if the court had agreed with the Third Circuit that an enforcement proceeding calls for a judicial decision based on the totality of circumstances in the record. *S.E.C.* v. *Wheeling-Pittsburgh Steel Corp.*, 648 F.2d 118 (3d Cir. 1981)(en banc).[1]

It is difficult to categorize with assurance the views of the other circuits on this issue. We cannot readily reconcile, for instance, the language in *United States* v. *Church of Scientology of California*, 520 F.2d 818, 821 (9th Cir. 1975) (enforcement is an adversary proceeding affording opportunity for challenge and complete protection to the witness) with that in *Casey* v. *F.T.C.*, 578 F.2d 793, 799 (9th Cir. 1978) (court's role strictly

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[1] The minority in *Wheeling* declared, as the Eighth Circuit has now held, that courts should limit themselves to good faith or bad faith standards in subpoena enforcement proceedings. 648 F.2d at 132-133.

limited unless information plainly irrelevant to any lawful purpose). The divergent views and the uncertainty in this area of law have been pointed out in another Third Circuit case, *United States* v. *Cortese,* 614 F.2d 914 (3rd Cir. 1980), in the concurring opinion:

> First, this court has recognized that the enforcement of Internal Revenue Service summonses often presents nettlesome problems. Not the least of these has been the confusing signals given to the district courts by the vague directives of the opinions in *Powell* v. *United States,* 379 U.S. 48, 85 S.Ct. 248, 13 L.Ed.2d 112 (1974), *United States* v. *LaSalle National Bank,* 437 U.S. 298, 98 S.Ct. 2357, 57 L.Ed.2d 221 (1978), and the many cases that have come down in this and other circuits.
>
> • • •
>
> I also believe that there has been so much uncertainty and murkiness clouding this entire area of challenges to the enforcement of I.R.S. summonses that we ought not to contribute still more.
>
> *United States* v. *Cortese,* 614 F.2d 914, 922-923 (1980).

The noted confusion and disagreement among and within the circuits discounts the value of attempted analysis, but holdings in the First and District of Columbia Circuits consistently allow broader judicial scrutiny of agency subpoenas than the *pro forma* role envisioned by the Eighth Circuit. See *United States* v. *Exxon Corp.,* 628 F.2d 70 (D.C. Cir. 1980) (enforcement of subpoena an independent judical action); *F.T.C.* v. *Atlantic Richfield Co.,* 567 F.2d 96 (D.C. Cir. 1977) (subpoena is subpoena of the court; enforcement procceding an adverserial process); *United States* v. *Fensterwald,* 553 F.2d 231 (D.C. Cir. 1977) (discovery allowed as to reasons for investigation); *United States* v. *Salter,* 432 F.2d 697 (1st Cir. 1970) (discovery allowed

as to purpose of investigation); *United States* v. *Tobins*, 512 F. Supp. 308 (D.C. Mass. 1981) (court will review decision to apply for subpoena enforcement to protect against arbitrary agency action).

Despite the announced intentions of elected officials, including recent presidents, government by agency is growing rapidly. The subpoena power accorded to these agencies is a vast one, and the use of that power occasions significant instrusions into the ordinary affairs of businesses and private citizens. To hold that a subpoena may only be invalidated by proven agency *malus animus*, an intangible state of an imaginary mind, is to deprive the citizens of any practical protection and the courts of the ability to do justice. In this case, the EEOC had the entire equal employment opportunity field audit conducted of petitioner by the Arkansas Highway Department; it had the payroll records and records of all "hires", "fires", promotions and wage rates; it knew that 40.6 per cent of petitioner's employees were classified as minorities, as compared with a county average of 19.6 per cent; it refused to specify any fact alleged by the complaining party tending to suggest discrimination; and it knew that the complaining party's charge had no merit. Yet it continued to ask that the employer make "restitution" to the complaining party, failing which the subpoena would be issued.

Is it really the law, or should it be, that an agency can proceed mindlessly, arbitrarily or capriciously? Is a subpoena sound if it has a conceivable proper purpose, although the immediate purpose is to force an undeserved payment of money?

We suggest that the Court should accept this case for the purpose of clarifying *Powell* and its progeny. We suggest that there is no practical difference in the subpoena powers of the several agencies when application must be made to the district court for enforcement. We suggest that this Court should instruct the country by generally applicable rules to be adopted in this case

that the district courts do have a meaningful function in passing on agency subpoenas; and that they have discretion to deny enforcement if the agency is found to be proceeding groundlessly, arbitrarily or capriciously, or in a manner or for a purpose which offends the conscience of the court.

Respectfully submitted.

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 82-1713 & 82-2421

Equal Employment
Opportunity
Commission,
Appellant,

v.

Michael
Construction
Company,
Appellee.

On appeal from the
United States
District Court for
the Eastern District
of Arkansas.

Submitted: February 14, 1983

Filed: May 4, 1983

Before HEANEY, McMILLIAN and ARNOLD, Circuit Judges.

HEANEY, Circuit Judge.

The Equal Employment Opportunity Commission [EEOC] petitioned the United States District Court for the Eastern District of Arkansas to enforce an administrative subpoena *duces tecum* issued to the Michael Construction Co. [Michael Construction] during the EEOC investigation of a racial discrimination charge filed by Roy Jackson against the company. The district court refused to enforce the subpoena, and awarded Michael Construction attorneys' fees as a prevailing defendant. We reverse and remand for enforcement of the subpoena.

I. FACTS

On May 14, 1980, Roy Jackson filed a charge of racial discrimination in the Little Rock, Arkansas, area office of the EEOC. The body of Jackson's charge read as follows:

> I was hired about 1-2-80. I was discharged on 2-11-80.
>
> When I reported to work on 2-11-80 Patricia Robinson, the secretary, told me I had to see Glenn Robinson, the project engineer, or Paul *LNU* [last name unknown], the superintendent.
>
> I believe that this is race discrimination because:
>
> 1. For five days I reported to work and just got the run around. They weren't around to find.
> 2. I was absent on Feb. 6, 7, and 8, but I called in on 2-7-80.
> 3. The company told the unemployment office that I was absent for two weeks, as of 2-6-80.

On May 16, 1980, the EEOC sent the company a notice of the charge with a copy of the charge attached.

The company responded to the notice and charge with a letter to the EEOC, dated May 30, 1980, and four signed statements by company personnel indicating that the company replaced Jackson on February 13, 1980, on the assumption that his absence since February 6, 1980, amounted to a voluntary resignation. In September of 1980, Bama N. Gardner, the EEOC specialist assigned to Jackson's case, sent Michael Construction a notice requiring the attendance of company officials at a fact-finding conference scheduled for October 14, 1980, and a "Discharge/General Questionnaire" requesting information surrounding Jackson's discharge and the company's disciplinary records and policies since January 1, 1980. In a letter dated October 8, 1980, the company asserted that the charge failed to allege any facts indicating racial discrimination and declined to forward any of the requested information.

The company failed to attend the factfinding conference, at which Jackson stated that at least one white employee had been absent under circumstances similar to those involved in his case and had not been discharged. On October 21, 1980, the EEOC again wrote to Michael Construction requesting information relevant to Jackson's charge, narrowing the scope of one request for attendance records of other employees to the period from January 21, 1980, through February 11, 1980, and directing the company that the EEOC could subpoena the requested information if withheld. The company, by letter dated October 31, 1980, again refused to volunteer the requested information and stated, "If you can tell us anything that the complainant has told you that would warrant a suspicion that our company may have discriminated because of race, then we would address that alleged fact or those alleged facts."

Finally, on February 9, 1981, the EEOC issued a subpoena *duces tecum* for the desired information. The company sought revocation of the subpoena before the agency. After administrative denial of the company's request, the EEOC filed the present action to enforce its subpoena on December 8, 1981.

II. DISTRICT COURT FINDINGS AND CONCLUSIONS

After a two-day hearing on the petition to enforce the EEOC subpoena, the district court stated its findings of fact and conclusions of law from the bench on April 14, 1982. The court noted that the proceeding raised two main issues: (1) the "adequacy and sufficiency" of Jackson's charge of racial discrimination and the EEOC notice of the charge, and (2) the good faith of the EEOC in investigating the charge. On the first issue, the court held that "the charge and the notice, which did not in any way amplify or expand upon the charge, is inadequate under the law for failure to state 'the circumstances of the alleged unlawful employment practice.' "

On the good faith issue, the court found that Gardner, the EEOC specialist assigned to Jackson's case, telephoned Ronald Jobe, the company's project engineer and equal employment opportunity officer, shortly after she sent the notice of the fact-finding conference and the EEOC questionnaire. The court stated that, during the conversation, "Mr. Jobe asked [Gardner] if she saw any validity in the claim. Ms. Gardner answered that she did not, but that that was really not the issue—that is, her personal view. Ms. Gardner then inquired of Mr. Jobe what restitution the company might be willing to make to Mr. Jackson." Based on this evidence and the company's October 31, 1980, letter to the EEOC requesting any facts tending to support a finding of racial discrimination, the court found that "the sending of the questionnaire and the scheduling of the conference and the pursuing of the discovery process was, at least, partially intended to bring about a monetary settlement in the case on behalf of Mr. Jackson." It concluded that Gardner viewed her duties to include that encouragement of settlements in all cases. The court called the exercise of that view in Jackson's case an example of "bureaucratic arrogance," and therefore refused to "lend its power to the enforcement of the administrative subpoena."

In addition, the court awarded attorneys' fees to Michael Construction based on the standard articulated in *Christiansburg Garment Co.* v. *EEOC*, 434 U.S. 412 (1978). Under this standard, attorneys' fees may be awarded to a prevailing defendant in an employment discrimination case where "the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith." *Id.* at 421. The court found that the EEOC investigation was not in "subjective bad faith" and that Jackson's charge, considered in conjunction with the EEOC file on his case, was not "frivolous," but that the EEOC proceeded in an unreasonable way and without foundation. The court stated that the EEOC "proceeded upon a charge that did not meet the statutory requirements. **** [It used the investigative process] to bring the company to a decision to pay to Mr. Jackson some amount, albeit nominal, to get rid of the case."[1] The court then directed the company's attorneys to submit affidavits detailing their fees. On October 13, 1982, it awarded Michael Construction attorneys' fees for all legal work done after the company's October 21, 1980, letter, which put the EEOC "on notice *** that the [company] was requesting specific allegations before it would comply with the subpoena."

III. SUFFICIENCY OF THE CHARGE AND NOTICE

Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e through 2000e-17 (1976 & Supp. IV 1980), grants the EEOC access to evidence of unlawful employment practices which is relevant to a charge of employment

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[1] In its written order awarding attorneys' fees to the company on October 13, 1982, the court simply stated that it had found the EEOC investigation and enforcement action "frivolous, unreasonable, and without foundation, even through not brought in subjective bad faith." This discrepancy in its oral conclusions and written order is irrelevant, because as a result of our decision Michael Construction is no longer a prevailing defendant entitled to attorneys' fees.

discrimination under that title. *Id.* § 2000e-8(a) (1976). Furthermore, the EEOC has the right to administratively subpoena that information and seek judicial enforcement of such a subpoena in the event of non-compliance. *Id.* § 2000e-9 (1976); 29 U.S.C. § 161(2) (1976). If the court finds that the charge or the notice of the charge, which the EEOC sends to the alleged discriminating party [respondent], is not sufficient under Title VII or EEOC regulations, it may deny judicial enforcement of the EEOC subpoena issued pursuant to that charge or notice. *See Shell Oil Co.* v. *United States EEOC,* 676 F.2d 323, 323 (8th Cir. 1982), *cert. granted,* 103 S. Ct. 1181 (1983); *EEOC* v. *Dean Witter Co.,* 643 F.2d 1334, 1335 (9th Cir. 1980); *EEOC* v. *Western Publishing Co.,* 502 F.2d 599, 603 (8th Cir. 1974).

As to a charge of racial discrimination and the notice thereof, Title VII explicitly requires:

> Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer *** has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on such employer *** within ten days, and shall make an investigation thereof. Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires.

42 U.S.C. § 2000e-5(b) (1976). EEOC regulations provide that a Title VII charge should contain a "clear and concise statement of the facts, including pertinent dates, constituting the alleged unlawful employment practices," 29 C.F.R. § 1601.12(a) (3) (1983); nonetheless, "a charge is sufficient when the Commission [EEOC] receives from the person making the charge a written statement sufficiently precise to identify the parties, and to describe generally the action or practices complained of," *id.* § 1601.12(b). The district court found that Jackson's charge and

the notice thereof were legally insufficient under the statute and regulations because they failed to state "the circumstances of the alleged unlawful employment practice." We disagree.

As a preliminary matter, we emphasize that charges filed by individuals must be construed in a liberal manner in order to effectuate the remedial and humanitarian purposes of Title VII. *EEOC* v. *Western Publishing Co., supra,* 502 F.2d at 602-603. EEOC regulations, which give substance to Title VII's mandate that a charge "shall contain such information and be in such form as the Commission required," 42 U.S.C. § 2000e5(b) (1976), only require that a charge "describe generally the action or practices complained of," 29 C.F.R. § 1601. 12(b) (1982). Jackson unequivocally charged that the company discharged him and gave false information to the unemployment office after his discharge. Thus, the charge described *specifically* the *actions* "complained of," and was legally sufficient under even a conservative construction standard.[2]

The company contends that, even if the law does not require more detail in the charge itself, the notice of Jackson's charge sent by the EEOC failed to meet the Title VII requirement that the notice include a statement of the "circumstances of the alleged unlawful employment practice," 42 U.S.C. § 2000e-5(b)

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[2] The company also argues that Jackson's charge was insufficient on its fact because his race was not noted thereon. This argument lacks merit. The company, the EEOC, and Jackson all knew his race, or had easy access to that information, at the time he entered the Little Rock EEOC office to file his charge.

(1976).[3] The company aparently reads this section to require a formal statement in the notice to the effect that the employer treated other employees more favorably because they were of a different race that the charging party. We refuse to adopt such a restrictive interpretation of the "circumstances" language in section 2000e-5(b).

Title VII mandates that prompt notice of a charge of racial discrimination be served to the respondent so charged. 42 U.S.C. § 2000e-5(b) (1976) (notice shall be served "within ten days" after charge is filed). The purpose of the notice is to apprise the respondent of the conduct which it might have to defend against claims of racial discrimination. *See EEOC* v. *Burlington Northern, Inc.*, 644 F.2d 717, 720 (8th Cir. 1981) (notice provision intended to ensure due process rights of respondent). Consistent with this purpose, we hold that the "circumstances" to which Title VII refers are the circumstances of the employer's actions against the employee who alleges improper racial motivation. The notice of Jackson's charge—stating pertinent dates, the parties involved, and the conduct of Jackson and his superiors immediately prior to his discharge—clearly identifies the circumstances surrounding his discharge and application for unemployment benefits.

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[3] The language of section 2000e-5(b) is unclear as to whether the "circumstances" requirement applies to the charge, to the notice of the charge, or to both. *See EEOC* v. *Dean Witter Co.*, 643 F.2d 1334, 1337 n.2 (9th Cir. 1980). We believe that the statute is referring to the notice, but a finding on this matter is unnecessary since, in the instant case, the EEOC attached Jackson's charge to the notice and nothing in that notice further explained the circumstances of the charge. Thus, if the charge itself would not meet the "circumstances" requirement, the notice would likewise fail. Moreover, in most cases, EEOC regulations state a preference that the charge should contain a "clear and concise statement of the facts, including pertinent dates, constituting the alleged unlawful employment practices." 29 C.F.R. § 1601.12(a)(3) (1982). We see no substantive distinction between the "statement of the facts" which will normally appear in a charge under the EEOC regulations and the "circumstances" required under the statute.

The notice in the present case also states Jackson's belief that the company's actions amounted to "race discrimination." Even though this allegation of discrimination is conclusory, it puts Michael Construction on notice that it is charged with treating Jackson adversely *because of his race* just as well as if the notice recounted instances in which the company treated employees of different races more favorably. *See EEOC* v. *Dean Witter Co., supra,* 643 F.2d at 1337. Specific instances of dissimilar treatment by the company of employees of other races may help decide the merits of Jackson's allegations, but these instances need not be recited in the notice.[4] To hold otherwise would penalize an employee who in fact was the victim of racial discrimination but who could not in good faith—and under oath, as required in section 2000e-5(b)—allege different treatment of employees of other races because of lack of information or because the victimized employee was the first to commit the infraction for which the employer allegedly disciplined

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[4] This reading of the "circumstances" language is not inconsistent with our holding in *Shell Oil Co.* v. *United States EEOC,* 676 F.2d 322 (8th Cir. 1982), *cert. granted,* 103 S. Ct. 1181 (1983). In *Shell Oil,* a panel of this Court found the charge and notice in a Title VII case initiated by the Commission insufficient to support an action to enforce an EEOC investigatory subpoena. The charge and notice in that case, however, cited no specific actions by the employer which were allegedly motivated by racial animus nor any statistics indicating disparate impact. Without "some factual or statistical basis" underlying the EEOC's general allegation of "discrimination in all areas of employment practice," the panel held that the notice was insufficient. *Id.* at 326. In the instant case, the notice of Jackson's charge alleged specific facts of his discharge and of false statements made by the company to the unemployment office. These allegations supply the "factual" basis missing in *Shell Oil.*

that employee.[3] Because the notice in the present case clearly identified the circumstances surrounding Jackson's discharge and application for unemployment benefits, we hold that the notice was sufficient under Title VII.

Thus, we find that the district court erred in denying enforcement of the EEOC subpoena based on the legal insufficiency of the notice and charge underlying that subpoena.

IV. GOOD FAITH OF THE EEOC

Even though the charge and notice are legally sufficient to support judicial enforcement of the EEOC subpoena in the instant case, the district court could refuse to enforce the subpoena if the EEOC acted in bad faith in its investigation of Michael Construction. Such a refusal would be appropriate, because the EEOC is invoking the court's process and "a court may not permit its process to be abused." *United States* v. *Powell*, 379 U.S. 48, 58 (1964) (footnote omitted).

Michael Construction raises the bad faith issue only by analogy to law which had developed primarily in the context of the judicial enforcement of Internal Revenue Service [IRS] summonses. *See generally United States* v. *LaSalle National Bank*, 437 U.S. 298 (1978); *United States* v. *Powell, supra*. The Supreme Court has discussed four elements tending to prove the good faith of the IRS in a subpoena enforement proceeding: (1)

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[3] Michael Construction stresses that the EEOC learned from Jackson's "intake" interview and his testimony at the October 14, 1980, fact-finding conference that at least one white employee was absent in circumstances similar to those surrounding Jackson's absence and that the white employee was not discharged. Even though the EEOC might have more appropriately included this information in the notice or requested that Jackson amend his charge to this effect, it was not required to do so under the statute or regulations. *EEOC* v. *Dean Witter Co., supra*, 643 F.2d at 1339. A charge and notice otherwise sufficient under the statute and regulations do not become insufficient under those authorities because the EEOC could have provided more information to the respondent.

that the agency is conducting its investigation pursuant to a legitimate purpose; (2) that the administrative inquiry is relevant to that purpose; (3) that the agency does not already possess the information sought; and (4) that the agency has followed proper procedural steps in conducting its investigation. *United States* v. *Powell, supra,* 379 U.S. at 57-58. Once the IRS makes a prima facie showing of good faith on each of these elements, a "heavy" burden shifts to the party contesting enforcement of the subpoena to prove bad faith, *e.g.*, by disproving any of the four elements. *United States* v. *LaSalle National Bank, supra,* 437 U.S. at 316-317. *See also United States* v. *Lask,* No. 82-1526, slip op. at 4 (8th Cir. March 30, 1983) (bad faith may be shown by disproving one of four *Powell* elements, but burden on summonee is a heavy one).[*] The basis of Michael Construction's assertion of EEOC bad faith in the present case is that the EEOC did not conduct the investigation for a legitimate purpose; rather, the company asserts that the EEOC pursued the investigation to force a settlement regardless of the merits of Jackson's charge.

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[*] The Third Circuit recently indicated that a court might deny judicial enforcement of a Securities and Exchange Commission [SEC] subpoena even where the conduct of the SEC meets the good faith standards articulated in the IRS cases. *SEC* v. *Wheeling-Pittsburgh Steel Corp.,* 648 F.2d 118, 125-126 (3d Cir. 1981) (en banc) (court's process may be abused even absent administrative bad faith). The only requirement other than good faith suggested by the majority in *Wheeling-Pittsburgh Steel,* however, was an SEC finding of a "likelihood" that a violation of the securities laws had occurred or was occurring. *Id.* at 127-130. Such a requirement is not free of criticism even in the fact of SEC rules to that effect. *See id.* at 132-133 (Adams, J., dissenting) (with Seitz, C.J., Rosenn, and Higginbotham, JJ.) (courts should limit themselves to good faith standards in subpoena enforcement proceedings); Comment, *SEC* v. *Wheeling-Pittsburgh Steel Corp.: Bad Faith and the Abuse-of-Process Defense to Administrative Subpoenas,* 82 Colum. L. Rev. 811, 816-821 (1982).

In its oral findings of fact after the hearings in this case, the district court found that the EEOC specialist investigating Jackson's charge pursued the investigation at least "partially" with the intent of achieving a monetary settlement even though, in her personal opinion, she saw no merit to Jackson's charge at that time. We hold that these findings of fact are not clearly erroneous. We disagree, however, with the court's implicit holding that such "partial" settlement motives on the part of the EEOC are not "legitimate."[1] Although the determination of whether the EEOC actually had certain purposes in mind when it pursued its investigation is a question of fact, which we could not reverse unless the district court committed clear error, the "legitimacy" of those purposes under Title VII is a question of law about which we can freely disagree with the district court. *See United States* v. *LaSalle National Bank, supra,* 437 U.S. at 319 n.21 (whether "good faith" is question of law or fact, district court's use of incorrect standard to measure good faith is a legal error).

Even if the "likelihood-of-a-violation" standard is appropriate in the context of an SEC investigation, we would not apply that standard to EEOC investigations because we have expressly held that "[r]easonable cause for finding a Title VII violation need not be established before an administrative subpoena may be validly issued. Rather, it is the function of such investigative subpoenas to establish whether reasonable cause to bring a discrimination charge exists." *EEOC* v. *Chrysler Corp.*, 567 F.2d 754, 755 (8th Cir. 1977) (citations omitted).

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[1] We might remand this case based on the analysis in *United States* v. *LaSalle National Bank,* 437 U.S. 298, 316 (1978), in which the Supreme Court held that the improper intent of an individual agent is an insufficient reason to deny judicial enforcement of an administrative subpoena; the intent of the *agency* as a whole is the deciding issue. *See also NLRB* v. *Interstate Dress Carriers, Inc.*, 610 F.2d 99, 112 (3d Cir. 1979) ("institutional good faith" test applicable to enforcement of NLRB subpoena). Such a remand is not necessary in this case, however, because we find that, as a matter of law, the EEOC investigation was proper even ascribing all the motives of EEOC specialist Gardner which can be derived from this record to the agency itself.

The EEOC has many functions, one of which is to "attempt to achieve a negotiated settlement" of charges brought under Title VII. *EEOC* v. *Associated Dry Goods Corp.*, 449 U.S. 590, 595 n.5 (1981). It also must investigate such charges to determine whether there is "reasonable cause" to believe the charges possess merit. 42 U.S.C. § 2000e-5(b) (1976). The subpoena power of the EEOC apparently extends only to the second function, that of "investigation." *See* 42 U.S.C. § 2000e-9 (1976) (subpoena power available for "the purpose of all hearings and investigations conducted by the Commission"). In order to preserve both of these functions, however, the EEOC may issue an administrative subpoena for information relevant and necessary to a determination of reasonable cause even though the subpoena may also provide additional incentive for the respondent to settle the charge. Otherwise, in practice, the EEOC could never seek judicial enforcement of an investigatory subpoena prior to a reasonable cause determination, at which time no futher information would be needed, without totally abandoning its role in achieving an early negotiated settlement between the parties. *See EEOC* v. *Associated Dry Goods Corp.*, *supra*, 449 U.S. at 595 n.5 (EEOC normally begins settlement process prior to reasonable cause determination); *EEOC* v. *Chrysler Corp.*, 567 F.2d 754, 755 (8th Cir. 1977) (finding of reasonable cause not necessary prior to judicial enforcement of EEOC subpoena).

If the administrative subpoena is solely to coerce a settlement, however, it would not have any "legitimate purpose" and a court would be correct in denying judicial enforcement of that subpoena. *See United States* v. *LaSalle National Bank*, *supra*, 437 U.S. at 314 & 316 n.18 (civil IRS summons solely to further criminal investigation is for improper purpose). Furthermore, if the settlement motives of the EEOC induce it to expand the scope of an administrative subpoena which is otherwise pursuant to a proper investigation on the question of reasonable cause, the subpoenaed party may seek judicial protection to

limit the scope of the subpoena to information relevant and necessary to the reasonable cause determination. Finally, the EEOC must dismiss a charge if it finds no reasonable cause after its investigation of the charge. 42 U.S.C. § 2000e-5(b) (1976); *EEOC* v. *Associated Dry Goods Corp., supra,* 449 U.S. at 595.

In the instant case, the district court merely found that the EEOC pursued the investigation of Jackson's charge *in part* to further the possibility of a negotiated settlement. Nothing in the court's findings indicates that settlement was the sole motive of any part of the investigation,[1] so the court's implicit determination that the motives behind the investigation were not "legitimate" is in error. Normally, since the court made an error of law which might have caused its findings of fact to be insufficient, we would remand for an explicit finding on the factual question of whether achieving settlement was the sole purpose of the EEOC investigation of Jackson's charge. Taking the findings made by the district court regarding bad faith as true and after a review of the entire record, however, we hold as a matter of law that the district court could not find that the EEOC acted solely to achieve settlement in this case.

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[1] In support of its claim that the EEOC acted in bad faith, the company cites the district court's written order awarding it attorneys' fees in which the court found that the EEOC investigation and subpoena enforcement action were "frivolous, unreasonable, and without foundation." We decline to equate this language with a finding that the EEOC investigation was brought in bad faith. The findings and conclusions made by the court from the bench immediately after the hearings indicate that the court based its attorneys' fees determination on the fact that the EEOC "proceeded upon a charge that did not meet the statutory requirements." Because we hold that the charge and notice were legally sufficient, this basis for the court's negative findings concerning the EEOC investigation is incorrect. Furthermore, the district court made these findings under an erroneous conception of the law regarding subpoena enforcement, *i.e.,* that *partial* settlement motives by the EEOC constituted an "illegitimate" purpose on which a court could deny enforcement. Under a proper view of the law, these findings would be clearly erroneous. Therefore, we give the findings no weight in our consideration of the bad faith issue.

The statements made by Gardner regarding her personal view of the merits of Jackson's charge came only after inquiries by Jobe, the company's equal employment opportunity officer. Gardner's opinion at that stage in the EEOC investigation of the charge does not tend to prove that the EEOC conducted the investigation solely to achieve a settlement. The EEOC need not, and indeed cannot in good faith, make a reasonable cause determination prior to its investigation of the charge—the factual basis for such a determination would be lacking. Gardner's response to Jobe's question was based on incomplete facts primarily because the company had from the start ignored EEOC requests for information going to the merits of the charge. The company agreed to give only what information it chose and to respond to specific factual allegations in the narrowest possible manner. This approach could easily conceal subtle acts of employment discrimination and would seriously hamper the EEOC in making an independent determination on reasonable cause. Finally, the EEOC in fact narrowed the scope of one of its information requests prior to its resort to the subpoena process. On these facts, neither we nor the district court could find that the EEOC had abandoned all legitimate purposes underlying its investigation. We therefore reverse the district court's refusal to enforce the administrative subpoena because of the allegedly "illegitimate" motives of the EEOC.

V. CONCLUSION

We realize that employers are vulnerable to charges of racial discrimination which are totally without merit. The EEOC, however, cannot defer to the opinions of employers so charged; it has the statutory duty to make an independent investigation, reasonable in scope, to determine for itself whether the charge of an aggrieved employee is more than just one individual's "belief." The courts, given the power to enforce EEOC subpoenas, are called to assist in good faith attempts to fulfill that duty. Because in the present case the EEOC acted on a sufficient

charge, gave proper notice to the company, and subpoenaed information needed to test Jackson's "belief" of racial discrimination, we reverse and remand for enforcement of the subpoena. We reverse the award of attorneys' fees to Michael Construction in its entirety.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

No. LR-M-81-447

Equal Employment
Opportunity
Commission,
Petitioner,

v.

Michael
Construction Company,
Respondent.

U.S. District Courtroom,
U.S. Post Office & Courthouse,
Little Rock, Arkansas,
Wednesday, April 14, 1983.

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FINDINGS OF FACT & CONCLUSIONS OF LAW

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APPEARANCES:

On behalf of petitioner:

EARNESTINE GRAY,
Equal Employment Opportunity
Commission,
New Orleans District Office,
F. Edward Hebert Federal Building,
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New Orleans, Louisiana 70130

On behalf of respondent:

THOMAS A. HARRIS,
Milligan, Hooper & Harris,
614 First Tennessee Building,
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THEODORE C. SKOKOS,
Gill, Skokos, Simpson, Buford
& Owen,
300 Commonwealth Plaza,
Little Rock, Arkansas.

PROCEEDINGS

* * *

THE COURT: Well, we have managed to make a day of it. I guess we could say at this stage the better part of two days. This is the first occasion that the Court has had, in all the years I've been on the bench, to spend so much time with a matter of this nature.

The petitioner asks the Court to lend its power to the enforcement of the subpoena which it served upon the respondent. Courts do not hesitate to lend their power to administrative agencies which are enforcing congressional mandates in good faith and within the limits of their powers and responsibilities. In fact, this Court does not recall ever having denied any such request in the past. However, in all such cases the Court must carefully assess the situation to be certain that the granting of the requested judicial intervention should not in fact be an abuse of the Court's process.

I do not intend to repeat here this afternoon what was said during and at the conclusion of the prior hearing, but I do think it is probably important to recall the language of the Powell case—United States versus Powell, 379 U.S. 48, 58 (1964 case) — wherein the Court stated: "Nor does our reading of the

statutes mean that under no circumstances may the Court inquire into the underlyng reasons for the examination. It is the Court's process which is invoked to enforce the administrative summons, and a Court may not permit a process — its process to be abused. Such an abuse would take place if the summons had been issued for an improper purpose, such as to harass the taxpayer or to put pressure on him to settle a collateral dispute, or for any other purpose reflecting on the good faith of the particular investigation. The burden of showing an abuse of the Court's process is on the taxpayer."

Here two issues have been raised: one, the adequacy and sufficiency of the claim and the notice of the charge of discrimination; and, two, the good faith of the petitioner. We have all read and reread the charge many times. It gives the date of hire and the date of the alleged discharge. It then states: "When I reported to work on 2-11-80, Patricia Robinson, the secretary, told me I had to see Glenn Robinson, the project engineer, or Paul LNU, the superintendent."

Mr. Jackson then states that "this is race discrimination because." In other words, the race discrimination has already been purportedly described in the sentence I've just quoted and then Mr. Jackson explains why such is race discrimination by reciting the following: "One, for five days I reported to work and just got the run-around. They weren't around to find. Two, I was absent on February 6, 7, and 8, but I called in on 2-7-80. Three, the company told the unemployment office that I was absent for two weeks as of 2-6-80." That's it. That's the charge. The claim does identify the employee. It does identify the employer and the date that the alleged discrimination took place — that is, the date of discharge February 11, 1980.

Does it set forth the "circumstances" which would reveal some basis for a race discrimination charge? It should be pointed out that the notice of charge of discrimination with copy of charge signed by Mr. Sande, S-a-n-d-e, R. Jones, Sr.,

Area Director, and dated May 14, 1980, provided the respondent with a copy of Mr. Jackson's charge but in no way elaborated thereon.

The section of the law — the old section before its amendment — read this way: "Whenever it is charged in writing under oath by a person claiming to be aggrieved, or a written charge has been filed by a member of the Commission where he has reasonable cause to believe a violation of this title has occurred (and such charge sets forth the facts upon which it is based) that an employer," et cetera, and it goes on.

That language was interpreted in various cases, including Sparton Southwest, Inc. versus Equal Employment Opportunity Commission, 461 F.2d 1055 in 1972. The Court stated: "The issue on appeal is thus whether the statutory provision quoted above requires that a charge filed by a Commissioner must 'set forth the facts upon which it is based' — that is, whether the parenthetical portion of the section refers to the charges filed by a Commissioner and is a requirement. It is our opinion that the trial court was correct in its holding that Congress by the portion in parentheses has expressly provided that the basic facts supporting a charge filed by a Commissioner be set forth therein."

Going on the Court states: "The sentence in which the critical words appear refers to the alternatives, charges by a person aggrieved or charges by a Commissioner, and the language in the parentheses by ordinary construction refers to the Commissioner's charges. It would appear that Congress did not wish to require an employee or a person who was directly involved to be required to do anything more than make a charge in writing. It is certainly reasonable to place a greater requirement on a member of the Commission."

The section was later amended and, as it applies to this case, reads — and I'm quoting from 2000e-5(b) — "Whenever a charge is filed by or on behalf of a person claiming to be ag-

grieved alleging that an employer has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on such employer," et cetera.

It would appear then that any deficiency in the charge can be supplied in the notice. In other words, if the EEOC had talked to Mr. Jackson and knew additional facts, this information could have been added in the notice that was sent to the employer, but no additional information was, in fact, included in the notice. So the question is: Does the charge or the notice state the "circumstances of the alleged unlawful employment practice."

The case of the EEOC versus Dean Witter Company, Inc., 643 F.2d 1334 in 1980, has a footnote that deals with this problem. That's a Ninth Circuit case. The footnote states: "The parties dispute whether the inclusion of 'date, place and circumstances' should be in the charge itself, as Dean Witter argues, or in the notice of the charge. Section 706(b) can be read either way. We find this distinction to be without practical significance. First, since the EEOC will send an employer both notice of the charge and a copy of the charge itself, the requirement at some point will have to be met in one form or the other.

"Second, EEOC regulations presently require that the charge contain the date, place and circumstances of the challenged practices, citing 29 C.F.R. 1601.11(a)(1976.) Although it might be a better practice for the date, place, and circumstances requirement to be included in the charge itself, the EEOC should be able to 'cure' any defects in the charge in its notice of the charge. (This may be necessary where the complainant is a private individual.)"

How is the charge — the EEOC charge — and the notice, how are they to be construed? The Eighth Circuit states in Equal Employment Opportunity Commission versus Western

Publishing Company, Inc., 502 F.2d 599 at page 602: "It is well established that lay complainants' charges are to be construed broadly in a liberal manner in order to effect the 'remedial and humanitarian underpinnings of Title VII and of the crucial role played by the private litigant in the statutory scheme.' " Quoting Sanchez versus Standard Brands, Inc.

Going on — "It is also established that: (1) complainants' allegations are not to be construed in a crabbed, artificial manner, citing Macklin versus Spector Freight; (2) the matters the Commission proceeds to investigate should assist in determining the scope of the complaint; and (3) the Commission has the authority to reframe charges and to use available materials and information to articulate lay complainants' charges."

It appears to the Court that that language emphasizes the power and the authority to deal with any technical defects that might appear in the original charge as filed by the complainant, if it has adequate information to remedy those defects.

So we come back and we ask ourselves whether the change of the language from "facts" as in the old act to "circumstances" in the new act implies any real distinction. The Court has concluded that it does not; that they both call for some articulation of the factual basis for the charge.

The claim in this case, which I have reviewed at some length, I would have to say is borderline. But I also have to take into consideration in making a final assessment the power of the Commission and the regulations.

The regulations state — I quote from 1601.12 — "Each charge should contain the following" and then they list various items. Item three is: "A clear and concise statement of the facts" — I emphasize "of the facts" — "including pertinent dates, constituting the alleged unlawful employment practices." See Section 1601.15(b).

The subparagraph (b) of item five of that section states: "Notwithstanding the provisions of paragraph (a) of this section, a charge is sufficient when the Commission receives from the person making the charge a written statement, sufficiently precise to identify the parties and to describe generally the action or practices complained of. A charge may be amended to cure technical defects or omissions, including failure to verify the charge or to clarify and amplify allegations made therein. Such amendment and amendments alleging additional acts which constitute unlawful employment practices related to or growing out of the subject matter of the original charge will relate back to the date the charge was first received. A charge that has been so amended shall not be required to be redeferred."

Then looking at 1601.15, I quote: "As part of each investigation, the Commission will accept any statement of position or evidence with respect to the allegations of the charge which the person claiming to be aggrieved, the person making the charge on behalf of such person, if any, or the respondent wishes to submit. As part of the Commission's investigation, the Commission may require the person claiming to be aggrieved to provide a statement which includes (a) — excuse me — (1) A statement of each specific harm that the person has suffered and the date on which each harm occurred;

(2) For each harm a statement specifying the act, policy or practice which is alleged to be unlawful;

(3) For each act, policy, or practice alleged to have harmed the person claiming to be aggrieved a statement of the facts, which leads the person claiming to be aggrieved to believe that the act, policy, or practice is discriminatory."

Now these regulations, I think, go a long way in helping the Court determine the adequacy of the notice in this case. The Commission is not left helpless in the face of an inarticulate, inadequate statement of a claim by a lay person. It has resources

to give body to the claim, to go back and to amend it, and to amplify consistent with the statements of the claiming party. And I think the very facts in this case, which I'll come to later, suggest that it had information at least at various points in the process which it could have used to amplify and to give body to the charge which would have put it into the realm contemplated by the requirements to state the circumstances as is required by the statute.

I conclude that the statement of the charge and the notice, which did not in any way amplify or expand upon the charge, is inadequate under the law for failure to state "the circumstances of the alleged unlawful employment practice."

Now I must point out that the adequacy of the charge in this case has some relationship to the bad faith issue that has been tendered by the respondents. That is, if the EEOC's agent suggested payment to Mr. Jackson without any information supporting the propriety thereof, this would be an important circumstance relating to the issue of good faith.

The Court will now review the pertinent evidence and make the essential findings of fact required in connection with this second issue.

Mr. Ronald D. Jobe, J-o-b-e, the project EEO officer for the respondent, Michael Construction Company, testified at the hearing in February. He is a graduate of Georgia Tech and has worked in construction for some eight and a half years. He had knowledge of the governmental requirements in connection with equal employment opportunity. He was the one assigned to handle discrimination complaints and had been through a training program in this regard. He conducted jobsite meetings at which equal employment opportunity policies of the company were discussed. He advised the employees of the company that if they had any discrimination complaints they should come to see him, Mr. Jobe.

Mr. Jobe never received a complaint from Mr. Roy Jackson. In fact, he never met Mr. Jackson. The first information he had concerning Mr. Jackson's charge was contained in the discrimination claim filed by Mr. Jackson on May 14, 1980 — that is, Respondent's Exhibit A.

Upon receipt thereof he looked into the employment record of Mr. Jackson, investigated the circumstances of his leaving the employ of Michael Construction Company. In that process he obtained four written statements which he then sent to the Equal Emlployment Opportunity Commission under a copy of his letter of May 30, 1980. The letter and the attachments being Respondent's Exhibit B.

The four statements indicate that Mr. Jackson was not fired but simply did not show up for work. Those statements further contradict the allegations of Mr. Jackson concerning his efforts to contact employees of the defendant company as are contained in his charge of discrimination.

Ms. Bama Gardner served as an EEO specialist from March 24, 1980 until September 20, 1981. She testified that this claim was referred to the factfinding unit on August 5, 1980. She stated she tried to contact the respondent on August 27 but was unsuccessful. On September 4, 1980, the claimant Mr. Jackson came in for the first time to discuss the case with her. There is some confusion in Ms. Gardner's testimony, but the Court finds that there is some indication that during this first meeting between Ms. Gardner and Mr. Jackson, he indicated his belief that white employees similarly situated, who had been absent from work, were permitted to retain their jobs.

Now I think that is a charitable finding in light of the actual testimony, but I think it is a proper one.

Ms. Gardner had the EEOC file with her at the time she testified. She revealed some of the "intake notes" which were apparently taken down by Mr. Charles Buchner — I think it's

B-u-c-h-n-e-r — who actually wrote up the original charge of discrimination — that is, Respondent's Exhibit A — on May 14, 1980. Although Ms. Gardner was reluctant to reveal the full contents of these intake notes to the Court, she indicated that Mr. Jackson stated he was replaced by a white person, and that four or five blacks had been discharged or laid off while he was an employee, and that he knew of one white foreman who he contended had been treated differently. None of this information, of course, found its way into the charge of discrimination or, indeed, into the subsequent notice which was sent to respondent with a copy of that charge. In other words, the notice of the EEOC to the respondent did not in any way expand upon, elaborate upon, or further explain the charge filed by Mr. Jackson.

Within a day after Mr. Jackson came into the office, Ms. Gardner contacted someone at respondent's office and received an indication that respondents were not interested in any financial settlement with Mr. Jackson. Promptly after the telephone call and only two days after her conference with Mr. Jackson, Ms. Gardner sent out to Mr. Jobe the "Notice of Charge of Discrimination and Notice of Factfinding Conference" together with a copy of certain of the Commission's rules and regulations, a questionnaire, and a description of the factfinding conference procedures.

Shortly after he received these documents Mr. Jobe was contacted by Ms. Gardner. She asked if he had received the notice and had read the requested document list. He advised her that he had received it but that the matter was no longer in his hands. Instead, Mr. Gilpatrick would handle the matter. Near the end of the conversation, Mr. Jobe asked Ms. Gardner if she had read Mr. Jackson's claim and the company's rebuttal — that is, Respondent's Exhibit B and the four enclosed statements — and Ms. Gardner replied that she had. Then Mr. Jobe asked her if she saw any validity in the claim. Ms. Gardner answered that he did not, but that that was really not the issue — that is, her per-

sonal view. Ms. Gardner then inquired of Mr. Jobe what restitution the company might be willing to make to Mr. Jackson. Ms. Gardner admits that she might have mentioned specific back-pay figures because Mr. Jackson had indicated he wanted back pay as part of his relief. Mr. Jobe then stated, "I don't think we owe him a dime."

Mr. Jobe had another conversation with Ms. Gardner about the matter in which she indicated that although she felt there was no merit to the charge, Mr. Jackson had chosen to purue it.

The factfinding conference was scheduled for October 14, 1980. On that date the respondent's letter of October 8, 1980 was received by Ms. Gardner. The letter states, inter alia — and I'm only quoting a portion of it — "The charge of discrimination fails to state or to suggest any fact that would tend to show race discrimination. When a charge so frivolous as this is presented, we have to make a determination as to whether the matter warrants the expenditure of time and money and the loss of supervision and production which would be necessitated by your request for personal appearances and for voluminous records which would indeed have to be newly produced from other records and from field investigations as we do not keep one set of records which would show the information you have requested."

Although the respondent did not send a representative or witnesses to the fact-finding hearing, Mr. Jackson, the claimant, did appear for the scheduled hearing on October 14 and did make further statements concerning his claim. He referred to an employee of the respondent by the name of "Whitey," described by him as a Caucasian who never reported to work. He also stated that he did not violate the company's policy with respect to absences. None of this amplification, none of this information was ever passed along to the respondent or made a modification of or an amendment to the charge or the notice of the charge.

On October 21, 1980, the area director of the EEOC wrote to the respondent advising it that if the requested information and records had not been received by November 10, 1980, the Commission would be compelled to proceed under Section 710. On October 31, 1981, Mr. J. B. Gilpatrick wrote to Mr. Jones, the area director, stating that his letter of October 21 was "nonresponsive to our letter dated October 8, 1980." Mr. Gilpatrick's letter of October 31 went on to state: "As we have attempted to point out, you do not even have a prima facie charge of race discrimination in the complaint. No fact or allegation of the former employee's complaint arguably connects his 'termination' (actually he just quit showing up for work) with his race. The 'discharge/general questionnaire,' which you have submitted to us, is totally unwarranted and constitutes nothing but harrassment. It would take weeks to prepare what you have requested. We are a relatively small company, and we cannot afford such waste. We rely on our constitutional rights as set out in our letter dated October 8. If you want to resort to the subpoena process on a completely nonmeritorious complaint, then you are certainly at liberty to do so. We reserve the right to contest the subpoena."

Then this paragraph which, I think, is important: "We would earnestly wish that you would look at the lack of merit in this complaint in a reasonable way, taking the man's own statement and the statements we have submitted. If you can tell us anything that the complainant has told you" — I want to repeat that — "If you can tell us anything that the complainant has told you that would warrant a suspicion that our company may have discriminated because of race, then we would address that alleged fact or those alleged facts. As matters stand, however, there is no rational connection between what is on the complaint and racial discrimination, and your 'questionnaire' is just a fishing expedition of the broadest and most oppressive scope which we cannot tolerate."

Now it is clear from the testimony that settlement was emphasized by Ms. Gardner in the handling of all her cases. She had handled about 20 cases before this one came up. Some had been settled, some had been withdrawn, and some determinations had been made. According to Ms. Gardner, a determination that a claim had good cause would occasion a lot more work because the file would then have to be referred to New Orleans.

There was no evidence in the file or known to the petitioner which would indicate that the respondents had any negative record with respect to racial discrimination charges concerning its employees. There has been no record or finding — there had been no record or finding of prior racial discrimination by the respondent, and there was no record of recalcitrance or lack of cooperation by the respondent in the handling or any other civil rights claims.

The Court cannot avoid the finding in this case that the sending of the questionnaire and the scheduling of the conference and the pursuing of the discovery process was, at least, partially intended to bring about a monetary settlement in the case on behalf of Mr. Jackson, and at that point there was certainly nothing in the file to indicate that Mr. Jackson's claim, in fact, had merit. Indeed, the file reflected to the contrary, and that appears to have been Ms. Gardner's own assessment of the situation.

Now the Court does not suggest that the respondent can be the judge of its own conduct, but it had no real notice of a racial discrimination charge. It had presented information tending to show that Mr. Jackson's case was entirely without merit. Its refusal to comply was based upon principle and upon its bona fide belief and feeling that the circumstances — that the Commission's actions in the premises were arbitrary and capricious and intended only to force a monetary payment to Mr. Jackson.

The Court does not believe that Ms. Gardner was prejudiced against the respondent or was in any way "out to get" the defendant company. But she had a view of her duties that suggested that anything that she could do to bring about a settlement was justified and should be encouraged. Now whether that was brought about by instructions given to her or not, it appears clear that that was her understanding of her responsibilities and of her duty.

Indeed, I think the Court should state settlements should be encouraged. There is often a very shady line between legitimate efforts to bring about a settlement and the abusive use of administrative power to coerce a settlement not predicated upon merit. The Court feels that the Commission crossed that line in this case.

Very frankly looking at the record as a whole and looking at what has happened in the processing of this case up to and into the court and to this date, the Court is left with the feeling that we have here a case of essentially bureaucratic arrogance. A case which the Commission hopes will ultimately end in a determination that it is essentially independent of judicial oversight. That may be the end of this case, but at this point the Court will not use its power to assist the Commission in the obtaining of that objective.

The petition, therefore, will be denied. The Court will not lend its power to the enforcement of the administrative subpoena.

The question of attorneys' fees has been raised. The Commission here has proceeded under 2000e Sections 8 and 9. Let me see if I can find that. More particularly I think 2000e 9 which deals with investigatory powers: "For the purpose of all hearings and investigations conducted by the Commission or its duly authorized agents or agencies, Section 11 of the National Labor Relations Act shall apply."

So I think the Commission was esentially proceeding to enforce its subpoena under that section of the Civil Rights Act.

Section 2000e (5) (k) concerns attorney's fees. It states: "In any action or proceeding under this title, the Court in its discretion may allow the prevailing party other than the Commission or the United States, a reasonable attorney's fee as part of the cost, and the Commission or the Untied States shall be liable for cost the same as a private person."

The United States Supreme Court has had something to say about attorney's fees in this situation, and I quote from Christiansburg Garment Company versus EEOC. The U.S. citation is 434 U.S. 410. I am actually quoting from 98 Supreme Court Reporter, page 700: "In sum, a district court may in its discretion award attorney's fees to a prevailing defendant in a Title VII case upon a finding that the plaintiff's action was frivolous, unreasonable, and without foundation, even though not brought in subjective bad faith."

Elsewhere it is stated: "Hence a plaintiff should not be assessed his opponent's attorney's fees unless a court finds that his claim was frivolous, unreasonable, or groundless, or that the plaintiff has continued to litigate after it clearly became so."

The case of EEOC versus New Enterprise Stone and Lime Company, which is cited in the Federal Rules Decisions, 74 F.R.D. 628 states at page 632: "We feel compelled to express concern about the zealousness of the EEOC in pursuing this matter — not unlike hunting mice with an elephant gun."

Then on the next column: "Every hearing and trial, be they civil, criminal or administrative in nature, is a search for ultimate truth."

Then on the next page: "It is not inconceivable that a small company could literally be put out of business by the cost of having to be represented at hearing after hearing over frivolous side issues. Where does the search for justice and ultimate truth

end and injustice begin? It is easy to generalize and say that everyone is entitled to his day in court, whether it is the little guy or the Government. When the day becomes may days, requiring the retention of counsel, filing of briefs, and all the other trappings which are a part of any court proceeding, it becomes injustice at some point. A little common sense is required."

And I guess that last statement summarizes the Court's frustration with this entire proceeding. I do believe, as I indicated in the argument to the attorneys, that both parties essentially are standing upon their own view of principle in this case. Clearly I think the respondent's position is justified in the light of what has been revealed to it. The petitioner's position, however, is harder to understand, and the Court cannot really find justification.

I mean even if one were to assume that the Commission is correct in its assessment of its powers and authority and that it can proceed as it has chosen to do in this case and can rely upon a charge such as has been presented here and need not amplify and can use its procedures to attempt to bring about a financial settlement, even if that were the law, should it? Should it? Why would it want to be — to act that way? Why would it not want to step back a little when a company essentially begs it to state anything it may have in its file that the claimant may have given it which would suggest that they had done anything to violate the Civil Rights Act. Why shouldn't they do that? Why shouldn't they make that information available to the respondent — to the company? I can't help but getting back to that letter — the last one that I read — where Mr. Gilpatrick states: "If you can tell us anything that the complainant has told you that would warrant a suspicion that our company may have discriminated because of race, then we would address that alleged fact or those alleged facts."

Now maybe the Commission doesn't believe that they would have responded any differently than they did, even if it had

amended its charge or the notice or otherwise reveal what information it had about the claimant's charge, but that's speculation as to what the company would have done. It is indicating that it would treat it in good faith, and there is certainly nothing in the record to suggest that it had handled other cases otherwise than in good faith.

So that does have something to do, I think, with what we are talking about here in terms of the attorneys' fees. The standard. "In sum, a district court in its discretion may award attorney's fees to a prevailing defendant in a Title VII case upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith."

Now I certainly don't think it was brought in subjective bad faith. If you look at what's in the file of the Commission, you would not say that it was frivolous. It would await some determination as to its validity perhaps, but the Commission, I think, clearly proceeded in an unreasonable way and without foundation. They proceeded upon a charge that did not meet the statutory requirements. The respondent had no obligation to respond to a charge that did not meet the statutory requirements. It then used the procedures in an attempt to bring the respondent company — to bring the company to a decision to pay to Mr. Jackson some amount, albeit nominal, to get rid of the case.

I am going to award an attorney's fee, but I am going to require that a detailed statement of the hours be presented and the charges of the attorneys. I am going to give the Government an opportunity to respond to it so if there are any factual issues I can determine them.

Now let me say this: that I think this case has been handled very ably by Ms. Gray. She has had a difficult case and she has handled it professionally and has, I think, made the most persuasive arguments that could possibly be made on behalf of the

Commission under the facts and circumstances. And I am not suggesting that she does not have her whole heart into it. I believe she does. She has been a zealous advocate on behalf of the Commission.

She has stated something that I think is important — and that is, the perception by the public of the agency should be, and she would hope it would be, and by all the employers and the employees, that this is an independent agency. It is not a partisan. It is not there to take sides or to bring about payments for people or to represent individuals. It is to determine whether the race discrimination and other discrimination laws of this country are complied with and to bring about a healthier climate to this country by seeing that they are complied with. So it is important. What the Commission chooses to do with its power is very important to its perception by the public of its independence and of its own objectivity, not as a partisan but as a fair adjudicator of these very important claims.

So I think it will inure ultimately to the benefit of the Commission if it is less, as I say, arrogant perhaps; if it is more reasonable in its dealings with the people who come before it. We are in this country now where we see this widespread malaise and discontent among the population. Much of it is attributed or is directed at the courts and agencies created by Congress to enforce their decisions as to public policy. And I think it is cases such as this one that creates that feeling and attitude in the public that in some cases Government abuses the powers or uses them unreasonably vis-a-vis the citizens with whom they deal.

So I do not feel comfortable and would not under the facts and circumstances of this case in lending this Court's power to the enforcement of the process — of the Commission's process, because to do so, I think would be an abuse of the Court's process.

Court will be in recess.

MR. SKOKAS: Your Honor, may I inquire when you would like the attorney's time submitted? Do you have a time frame?

THE COURT: I think you should submit it within 10 days. Send a copy to Ms. Gray. Ms. Gray will have 10 days to respond. If there are any factual issues, we'll worry about how to settle them.

Court will be in recess.

(Whereupon, the above-entitled proceedings were concluded.)

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

No. LR-M-447

Equal Employment
Opportunity
Commission
Applicant

v.

Michael Construction
Company
Respondent

ORDER

A hearing was held in this matter on February 26, 1982, and continued on April 14, 1982. For the reasons stated on the record by the Court on April 14, 1982, based upon the findings and conclusions stated at that time, it is Ordered that the petition by the Equal Employment Opportunity Commission for enforcement of the subpoena *duces tecum* served by it upon the respondent on February 24, 1981, be, and it is hereby, denied.

It is further Ordered, for the reasons stated on the record at the conclusion of the hearing on April 14, 1982, that the EEOC be, and it is hereby, required to reimburse the respondent, as part of costs, all attorney's fees incurred in opposing the efforts of the EEOC to enforce the subpoena. The respondent shall file on or before April 26, 1982, an affidavit containing an itemized account of all such fees claimed. The EEOC may then file, on or before May 6, 1982, objections, if it has any, to the amount claimed by the respondent.

Dated this 16th day of April, 1982.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

No. LR-M-447

Equal Employment
Opportunity
Commission
Petitioner

v.

Michael Construction
Company
Respondent

ORDER

By an Order filed April 16, 1982, for reasons that had been stated on the record in open court at the conclusion of a hearing on April 14, 1982, the Court ordered that the petition for enforcement of a subpoena *duces tecum* filed by the EEOC in this case be denied and that the EEOC be required to reimburse the respondent all reasonable attorney's fees incurred in opposing enforcement of the subpoena as part of costs in this action. Thereafter, pursuant to the orders of the Court, the respondent submitted affidavits containing itemized accounts of all fees claimed as a result of the order of the Court. Now pending before this Court is a motion by the EEOC seeking removal of the affidavits concerning attorney's fees from the record, and seeking an order requiring that the respondent comply with certain procedural requirements in its request for fees.

The procedural requirements that the EEOC seeks to impose are unnecessary and will not be ordered by this Court. The Court has already concluded that the respondent was the

"prevailing party" in this litigation, that the action by the EEOC was "frivolous, unreasonable, and without foundation, even though not brought in subjective bad faith," and therefore that the respondent is entitled to an award of attorney's fees as part of costs. 42 U.S.C. § 2000e(5)(k); *Christansburg Garment Co.* v. *Equal Employment Opportunity Commission,* 434 U.S. 412, 421 (1978). The only issue left to be decided is the amount of that award. The respondent complied with the orders of the Court by filing the affidavits to which the Commission objects. The respondent has not suggested that the fee requested, which is based on payment on standard hourly rates for time expended, should be adjusted in any way due to the special circumstances of the case, as might be allowed by *Johnson* v. *Georgia Highway Express, Inc.,* 488 F.2d 714 (5th Cir. 1974). To require now that the respondent refile the affidavit as part of a bill of costs on a specific form from the administrative office, or to require the detailed brief of the law as requested by the EEOC, is unnecessary and would only serve to prolong these proceedings and to thereby increase the amount of the fee award. Such will not be ordered.

The EEOC did indicate in the motion and supporting pleadings that it had specific objections to the amounts claimed in the affidavits, but refused to state those objections to the affidavits because of its contention that the affidavits are "deficient on their face." Although the Court feels that the position taken by the Commission in this regard is somewhat unreasonable and that it has effectively served to delay this matter, justice would best be served by allowing the Commission another opportunity to specifically contest the amount of the fee claimed by the respondent. Therefore, the EEOC will be allowed until Thursday, July 29, 1982, to file a pleading in which it specifically alleges which portions of the attorney hours claimed were duplicitous, unnecessary, or otherwise objectionable. The pleading should be supported by affidavits or other documentary evidence to the extent possible. Upon receipt of the pleading, the Court will determine if a hearing will be

necessary, if further discovery on the issue of attorney's fees should be allowed as requested by the Commission, and also if legal briefs are necessary.

It is therefore Ordered that the Motion for Removal from the Record of Affidavits and for the Issuance of an Order be, and it is hereby, denied.

It is further Ordered that the EEOC shall file a pleading responsive to the affidavits filed by the respondent, as indicated herein, on or before July 29, 1982.

Dated this 16 day of July, 1982.

This document entered on docket sheet in compliance with Rule 58 and/or 79(a) FRCP on 7-19-82 by DC.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

No. LR-M-447

Equal Employment
Opportunity
Commission
Petitioner

v.

Michael Construction
Company
Respondent

ORDER

This action was commenced by the Equal Employment Opportunity Commission to seek enforcement by the Court of a subpoena *duces tecum* that had been issued and served upon the respondent, Michael Construction Company, by the agency. Following a hearing on the matter held on February 26, 1982, and continued on April 14, 1982, the Court denied enforcement of the subpoena. The Court further found that the respondent was the "prevailing party" and that the action had been "frivolous, unreasonable, and without foundation, even though not brought in subjective bad faith," and therefore ordered that the E.E.O.C. would be required to reimburse the respondent, as part of its costs, all attorney's fees reasonably incurred in opposing enforcement of the subpoena. Pursuant to the directions of the Court, the respondent caused to be filed affidavits by the two attorneys representing it in this matter setting forth the fees and expenses claimed.

The respondent was represented by two attorneys in this proceeding: Mr. Thomas Harris, of the law firm of Milligan, Hooper & Harris in Chattanooga, Tennessee; and Mr. Theodore Skokos of the law firm of Gill, Skokos, Simpson, Buford & Owen in Little Rock, Arkansas. Mr. Harris is the general counsel for the respondent, and Mr. Skokos was retained as local counsel for the purposes of this proceeding.

Mr. Skokos' affidavit accompanied a detailed bill of all expenses and fees claimed. The itemized bill includes a record of all conferences conducted, telephone calls, legal research time, and expenses. The services are for the period from February 1, 1982, through April 20, 1982. Mr. Skokos billed the respondent for 28.9 hours at $100.00 per hour for a total of $3,024.22.

The affidavit of Mr. Harris also contained an itemized bill of all fees and expenses. The Court considers the bill to be sufficiently detailed. It contains specific dated and timed references to all telephone calls, conferences, letters, research, and drafting. Mr. Harris' bill begins on September 25, 1980. From that date until September 10, 1981, he itemizes the fees and expenses in connection with his review of the E.E.O.C. charge and the subpoena which was served upon the respondent. The charge was served on the respondent on May 16, 1980. The subpoena was initially served on February 14, 1981. It was not until December 8, 1981, that the petitioner filed the show cause application in this Court, thereby initiating formal legal proceedings. From September 25, 1980, until October 29, 1980, Mr. Harris billed his client for his review of the E.E.O.C. documents that accompanied the complaint, for various conferences with Mr. J. B. Gilpatrick of Michael Construction Company, and for legal research. This amounted to 2.75 hours at $70.00 per hour for a total of $192.50. From February 19, 1981, until September 10, 1981, Mr. Harris billed his client for his review of the subpoena, his preparation of a petition to revoke the subpoena, and various conferences and calls with officials of the respondent and attorneys for the petitioner. This amounted to 20 hours at $70.00 per hour for a total of $1,400.00.

From December 9, 1981, to April 15, 1982, Mr. Harris' itemized bill relates the specific time spent on preparing the objections to the petitioner's request for a show cause order. This portion of the bill totals 31.25 hours at $70.00 per hour, two days for the first hearing (including travel at $60.00 per day, and 23.5 hours at $75.00 per hour (Mr. Harris' hourly billing rate increased from $70.00 to $75.00 per hour on March 1, 1982). In total, Mr. Harris billed his client for $5,150.00 for the period after the service of the show cause application on December 9, 1981. In addition, the itemized bill details expenses at $221.16.

After the submission of the Harris and Skokos affidavits, the E.E.O.C. filed a "motion for removal of affidavits from the record, and for the issuance of an order." The petitioner made general objections to the two itemized bills, including "duplication of effort by counsel . . ., a failure to discuss all of the 12 criteria of *Johnson* v. *Georgia Highway Express,* 488 F.2d 714, 717-9 (5th Cir. 1974), needless attorney hours and exorbitant costs and inflated fees, and an attempt to recoup fees from the date the subpoena was received," as opposed to the date the motion for a show cause order was filed. The petitioner specifically requested the opportunity to conduct discovery and a hearing on the attorney's fees issue.

After that motion was filed on May 5, 1982, both Mr. Harris and Mr. Skokos filed supplemental affidavits detailing additional fees and expenses. Those fees were largely for work done in preparing the original affidavits, and in responding to the E.E.O.C.'s motion for removal of the affidavits. Mr. Harris billed his client for 7.25 hours at $75.00 per hour and expenses of $28.50, for a total of $594.28. Mr. Skokos' bill reflects additional work of 2.5 hours at $100.00 per hour and expenses of $4.35 for a total of $254.35.

The petitioner filed an additional response asserting that it was the respondent's burden to prove up all fees and expenses incurred in resisting the enforcement of the subpoena, in accord with the principles in *Johnson* v. *Georgia Highway Express, supra.*

Mr. Harris submitted another affidavit indicating that his client had paid its bills in full.

On July 19, 1982, this Court entered an order denying the petitioner's motion to remove the affidavits. The Court made clear in that order that the issue of whether the respondent was entitled to attorney's fees had already been decided and that the only remaining issue was the amount of those fees. The Court did not deem it necessary to require the respondent to file detailed briefs, inasmuch as the respondent had not requested an upward adjustment of its fees along the lines of *Johnson, supra.* In addition, the Court was concerned that any additional briefing would only serve to increase the amount of the fee award to be paid by the E.E.O.C.

The Court did allow the E.E.O.C. to file one more pleading to specifically allege "which portions of the attorney hours claimed were duplicitous, unnecessary, or otherwise objectionable." The pleading was to be supported with affidavits and other documentary evidence of the extent possible.

Pursuant to the Court's order, the E.E.O.C. filed its specific objections on July 26, 1982. All billings from September 25, 1980, to October 10, 1981, were objected to because they were prior to the application for the show cause order. The petitioner specifically stated that the E.E.O.C. charge and the subpoena could have been handled without an attorney. The petitioner also specifically objected to the hourly rates charged by both attorneys. They noted that Mr. Skokos charged more than Mr. Harris, and that neither attorney had any demonstrable specialization or expertise in the field of equal employment law. The E.E.O.C. submitted the Martindale-Hubbell listings of two attorneys with recognized specialization and experience in the field. The petitioner also questioned how the itemized bills were maintained (contemporaneous with the work done, or on a post-hoc basis).

Those are the only specific objections that the petitioner offers. All of the others are more questions than specific substantive objections to the hours that are claimed. The E.E.O.C. continually questions why certain conferences were necessary, who was involved in each conference or telephonic communication, what was the breakdown of the time spent on research and drafting, and to what issues particular hours of research were directed. The Court does not deem it necessary to give these questions an extended discussion. The Court has examined the itemized bills and concludes that they are sufficiently detailed and specific. The petitioner has made no specific objections which would lead the Court to conclude otherwise.

The petitioner's objection to the hourly rates charged by Mr. Harris and Mr. Skokos requires a differentiation between the two attorneys. As previously noted, Mr. Harris is the retained general counsel for Michael Construction company. He has continually billed his client at $70.00 and $75.00 per hour. As established in Mr. Harris' supplemental affidavit, the respondent has paid Mr. Harris' bill in full. Under the circumstances, the Court considers Mr. Harris' hourly rate reasonable. He ordinarily bills the respondent, as its retained general counsel, at the same hourly rate. There has been no allegation that the quality of his representation in this proceeding was inadequate, or that his hourly rate was necessarily excessive. The Court views Mr. Harris' work in this case as competent and professional. Furthermore, Mr. Harris is an experienced attorney with 22 years in private practice. Given these circumstances, the Court sees no reason to reduce the hourly rate at which Mr. Harris ordinarily bills his client.

Mr. Skokos was retained as local counsel for the purpose of these proceedings. He billed the respondent for 31.5 hours at $100.00 per hour. Mr. Skokos practices law in the Little Rock area, and has been a member of the Arkansas bar since 1972. It is the Court's opinion that he provided Michael Construction Company with competent and professional representation in these proceedings.

Despite the quality of his services, the Court feels that some reduction of Mr. Skokos' hourly rate is in order. This Court is continually faced with attorney's fees requests, particularly in employment discrimination and civil rights cases. In resolving these attorney's fees questions, the Court endeavors to maintain consistent awards with respect to the hourly rates charged in this community, based on its knowledge of the customary local rates and the general quality of legal services provided. Accordingly, the Court will refer to its most recent attorney's fees awards to ascertain the proper hourly rate.

In *Jones, et al.* v. *MacMillan Bloedel Containers, Inc.*, LR-75-C-4 (Memorandum Opinion, December 19, 1980), this Court concluded that the proper hourly rate for an attorney specializing in employment discrimination in the Little Rock area, with 17 years of experience, was $80.00 per hour for in-court time and $50.00 per hour for out-of-court time. While the standard hourly rate has increased slightly since December 1980, the above rates were those of a very experienced attorney who concentrates exclusively on employment discrimination and civil rights litigation. Given Mr. Skokos' relative levels of experience and specialization, and assuming the increase in hourly rates since December 1980, the Court has determined that an award of $50.00 for out-of-court time and $75.00 for in-court time is proper. While the determination of a proper hourly rate is necessarily somewhat arbitrary, the Court considers the above rates to be proper under all the circumstances.

Mr. Skokos billed the respondent for 31.4 hours: 13 in-court hours[1] and 18.4 out-of-court hours. At the above hourly rates, the respondent is entitled to $975.00 for Mr. Skokos' in-court time and $920.00 for his out-of-court time, for a total of $1,895.00.

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[1] Mr. Skokos' bill did not specify the exact number of hours spent in court on February 26 and April 14. The 13 hour figure is based on the Clerk's minutes of those proceedings contained in the official file.

The petitioner has also questioned how the itemized bills were maintained. Specifically, the petitioner challenges whether the bill was maintained contemporaneously or assembled on a post-hoc basis after the issue of attorney's fees was before the Court. It is clear to the Court that the bills were, in fact, maintained on a contemporaneous basis. That is evident from the fact that both attorneys submitted updated bills. In any event, both bills were submitted along with sworn affidavits that the statements fairly represented the services actually rendered. The petitioner offers no reason to doubt the veracity of those sworn statements.

The petitioner's final contention is that the fees for services rendered before the application for the order to show cause should not be allowed. The Commission argues that "[t]hese billings arose even before the instant action was commenced, and were voluntarily undertaken by the Respondent, who could have, as a number of respondents have, handled the matters encompassed by these billings without the advice or assistance of counsel." The fact that the respondent could have proceeded without an attorney is not relevant. The Court is authorized by statute to award a *reasonable* attorney's fee to the prevailing party. 42 U.S.C. § 2000-e(5)(k) provides that "[i]n any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs." The filing of the charge and the preliminary request for data are both actions or proceedings "under this subchapter." *See, e.g.*, 42 U.S.C. § 2000-3(5)(b) (provision for the filing of an employee's charge by the E.E.O.C. and service upon the employer). The courts which have addressed the issue have concluded that the attorney's fee provision cited above applied to administrative as well as judicial proceedings initiated under Title VII. *Foster* v. *Boorstin*, 561 F.2d 340 (D.C. Cir. 1977); *Fischer* v. *Adams*, 572 F.2d 406 (1st Cir. 1978); *Johnson* v. *United States*, 554 F.2d 632 (4th Cir. 1977). The Court's inquiry is therefore whether the attorney's services in connection with the administrative action taken by the E.E.O.C. were reasonable.

In determining whether an award of attorney's fees for services rendered prior to the institution of this action is reasonable, the Court is guided by the same analysis which led it to conclude that the E.E.O.C.'s application to enforce the subpoena was frivolous and without foundation. The Court found that the respondent had informed the Commission that it was not aware of any basis for the complainant's charges and requested that it be informed of any specific allegation of racial discrimination upon which it could supply data. The Court also found that the Commission was aware that the charges were groundless. The Court found particularly persuasive the letter from Mr. J. B. Gilpatrick of Michael Construction Company to the area director of the E.E.O.C. of October 31, 1980, wherein Mr. Gilpatrick wrote: "If you can tell us anything that the complainant has told you that would warrant a suspicion that our company may have discriminated because of race, then we would address that alleged fact or those alleged facts." (Tr. 16). From that point forward, the Court concluded that the E.E.O.C. was unreasonable in pursuing its request for information. The Commission had no specific basis for the complainant's charges and was on notice from October 31, 1980, forward that the respondent was requesting specific allegations before it would comply with the subpoena.

The Court therefore concludes that all of Mr. Harris' services which were rendered after October 31, 1980, are compensable as a reasonable attorney's fee to the prevailing party. A review of Mr. Harris' original affidavit indicates that a total of 2.75 hours at $70.00 per hour were billed between September 25, 1980, and October 30, 1980. This amounts to fees of $192.50. Those fees are not recoverable as part of the prevailing party's reasonable attorney's fee.

Mr. Harris' total fees and costs amount to $7,557.94. Of that amount, the Court will disallow $192.50. Therefore, for Mr. Harris' services, the respondent will be awarded attorney's fees of $7,365.44. Mr. Skokos' total bill for fees and costs is

$3,278.57. The Court has reduced the total fees to $1,895.00. The Court will allow Mr. Skokos' expenses of $138.57. Thus for Mr. Skokos' services, the respondent will be awarded $2,033.57.

It is therefore Ordered that the respondent be awarded a total of $9,399.01 for a reasonable attorney's fee as the prevailing party in this action.

Dated this 13th day of October, 1982.

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 82-1713/82-2421-EA

September Term 1982

Equal Employment
Opportunity
Commission, et al,
Appellant,

vs.

Michael Construction
Company, et al,
Appellee.

Appeal from the
United States
District Court for
the
Eastern District
of Arkansas

The Court, having considered appellee's petition for rehearing and suggestions for rehearing en banc and being now fully advised in the premises, hereby orders the petition for rehearing and suggestions for rehearing en banc denied.

June 1, 1983